STATE OF MICHIGAN

COURT OF APPEALS

RICHARD AUGUSTYN, Personal Representative of the Estate of NANCY AUGUSTYN, Plaintiff-Appellant,	UNPUBLISHED August 18, 2005
v	No. 262238 Oakland Circuit Court
TARGET CORPORATION, d/b/a MARSHALL FIELDS, Defendant-Appellee.	LC No. 2004-057167-NO

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and decedent were walking some distance apart among the coat racks in defendant's store when decedent fell to the floor. Plaintiff did not witness decedent's fall; however, she told him that she tripped on a coat rack.[1]

Plaintiff filed suit alleging that defendant negligently failed to maintain the premises in reasonably safe condition and to warn of the unsafe condition. Specifically, plaintiff alleged that decedent tripped on the leg of a coat rack that was obscured by coats and could not be observed upon casual inspection. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the condition was open and obvious, that no special aspects made the condition unreasonably dangerous in spite of its open and obvious nature, that no evidence showed that a defect existed in any rack, that plaintiff could not show that it had notice of any defective condition, and that plaintiff could not establish that decedent's damages were proximately caused by its negligence. The trial court granted the motion pursuant to MCR 2.116(C)(10), finding that the condition about which plaintiff complained, the coat racks, was open and obvious, and that no special aspects made the condition unreasonably dangerous. The

[1] Decedent suffered a stroke and died approximately six weeks after the accident occurred.

trial court noted that no evidence other than plaintiff's estimation established the distance between the racks. The trial court did not address defendant's issues regarding the existence of a defect in a rack or proximate cause.

After reviewing the trial court's decision de novo, we affirm. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture." *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The test is objective. A court must look to whether a reasonable person would have foreseen the danger, and not whether the particular plaintiff should have known that the condition was hazardous. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). If special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

A storekeeper must provide reasonably safe aisles for customers. In a premises liability action, a plaintiff must show either that the defendant caused the unsafe condition, or that the defendant knew or should have known of the unsafe condition. Such knowledge may be inferred from evidence that the condition existed for a sufficient length of time for the storekeeper to have discovered it. *Berryman v K-Mart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992).

Plaintiff's theory was that defendant created a dangerous condition by placing coat racks too close together, thereby creating a tripping hazard. However, no evidence established that the racks were in such close proximity to one another that customers could not walk among them without turning sideways, etc. Plaintiff acknowledged that the racks appeared to have been positioned in a manner that created walkways in the formation, and that no portion of the bottoms of the racks extended beyond the perimeters created by the coats that hung on the racks. A reasonable person would know that a merchandise rack is supported in some manner, and would be able to foresee the danger associated with placing one's feet below those mechanisms.

Joyce, *supra*. Under the circumstances, the fact that decedent might not have seen the support mechanism on the rack on which she allegedly tripped is irrelevant. *Novotney*, *supra* at 477. The trial court did not err in concluding that no evidence showed that a question of fact existed as to whether the condition was open and obvious.

Furthermore, the trial court correctly found that no special aspects made the condition unreasonably dangerous in spite of its open and obvious nature. Decedent's health problems, which caused her some difficulty with walking, were not an aspect of the condition itself, and thus cannot be considered as having contributed to any extant danger. *Lugo*, *supra* at 519 n 2. Plaintiff has not shown that any other factors, such as lighting or the presence of sizable shopping crowds, actually impeded decedent's ability to walk among the racks.

An accident is not, in and of itself, evidence of negligence. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). To prove negligence, a plaintiff must establish a breach of duty owed by the defendant that proximately caused the plaintiff's injuries. *Case*, *supra*. Decedent told plaintiff that she tripped on a coat rack. However, the mere possibility that a breach of duty by defendant caused decedent to sustain injuries is not sufficient to establish causation. *Berryman*, *supra*. The trial court properly decided the issue as one of law and granted defendant's motion for summary disposition. See *Reeves v K-Mart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens